No. 07-541

IN THE

Supreme Court of the United States

ALEXANDRIA CITY SCHOOL BOARD,

Petitioner,

v.

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(2004) ("IDEA") requires school districts to specify a particular school at which the IEP is to be performed.

II. Whether a substantive defect within an individual education plan results in a denial of a free and appropriate public education under the IDEA.

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SUMMARY OF THE ARGUMENT

The Petitioners urge this Court to grant certiorari based on a representation that the Fourth Circuit's decision conflicts directly with established authority from other Circuits and from the Fourth Circuit itself. They seek to have this Court reach this conclusion by misstating the majority holding and the facts of this case. The Fourth Circuit properly held that the Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(2004) requires school districts to specify a particular school at which the IEP is to be performed. The Fourth Circuit further held that the failure to comply with this provision of the IDEA is a substantive violation. The conclusions reached by the Fourth Circuit are consistent with the precedent of the Fourth Circuit as well as the other circuits who have reviewed the issue in the case at bar. Because the Fourth Circuit's holding is consistent with the intent of Congress and the stated goals of the Individuals with Disabilities Education Act, the Petition for Writ of Certiorari should be denied.

PROCEDURAL HISTORY

This case was initiated when A.K.'s Parents sought a due process hearing pursuant to the IDEA against Alexandria City Public Schools (hereinafter, "ACPS" or "School Board"). On September 13, 14 and 16, 2004, a three day hearing was held to address the Parents' allegations that the proposed IEP violated the IDEA both substantively and procedurally. At the conclusion of the evidence, the Hearing Officer provided a written opinion. However, the writing failed to address the issues raised by the Parents and simply concluded that "the fact that [ ] did

not specify a particular private day program suggest to me that [ ] wanted to give the parents as much flexibility as possible." (App. 79(a)). The Hearing Officer's conclusion simply left the Parents legitimate questions unanswered. As a result, on March 1, 2005, the Parents sought an appeal to the U.S. District Court for the Eastern District of Virginia, pursuant to 20 U.S.C. § 1415(i)(2), alleging that the Hearing Officer failed to make the required findings of fact and address whether the IEP and the proposed placements met the requirement of a free and appropriate public education.

As determined by the Fourth Circuit Court of Appeals, the Trial Court also failed to apply the substantive and procedural mandates of the IDEA. Rather than require strict adherence to the procedural requirements of 20 U.S.C. § 1415, the Trial Court simply dismissed the procedural violations. Specifically, the Trial Court disregarded the procedures of the IDEA and the interpretative case law related to written notice. First the Trial Court determined that the "[p]arents knew or should have known" that a private day placement was being considered." (*A.K. ex rel J.K. v. Alexandria City School Board*, 409 F. Supp. 2d. 689, 693 (E.D. Va. 2005), 2005 U.S. Dist. Lexis 38392, App. 39(a)).[1] Additionally, the Trial Court determined that a level of placement was sufficient to meet the writing requirements of the IDEA despite the case law to the contrary. Finally, the Trial Court improperly adopted the Hearing Officer's determinations and held that "it is not

1. The record was clear that the Parents repeatedly requested information concerning what placements were being considered but ACPS failed to provide it either orally or in writing. (J.A. at 150, 965 (Dr. Kling), 1123, 1133 (E. Sullivan)).

necessary for the IEP to presume what transitional problems A.K. may encounter, then describe what services will be provided to combat them." (409 F. Supp. 2d. 694, App. 41(a)). In adopting the Hearing Officer's findings, the Court determined that anticipating a child's needs was not a requirement of the IEP. This stands in direct conflict with 20 U.S.C. § 1414(d)(4)(A)(i-ii)). The effect of the Trial Court's erroneous conclusion was to require that the Parents of a handicapped child would have the primary burden of identifying a school for their child.

The Fourth Circuit Court of Appeals, properly concluded that "[i]n finding that ACPS offered A.K. a FAPE, the district court erroneously relied on the premise that ACPS made a placement offer both at the Phillips School and the Kellar School." (1484 F.3d 681-682, App. 14(a)). Building on a proper analysis of the facts, the Fourth Circuit Court of Appeals concluded that the procedural requirements of the IDEA must be strictly enforced as determined by the Supreme Court. (See, *Rowley*, 458 U.S. 176, 205). The Fourth Circuit went on to conclude that the Trial Court's application of the law to the facts was clearly erroneous because the Judge incorrectly determined that ACPS did not have to adhere to the procedures in 20 U.S.C. § 1415 and allowed ACPS to abdicate its responsibility to make a specific offer. The Fourth Circuit Court of Appeals was the first tribunal to properly analyze the facts of the case and require the School District take the final steps of the IEP process and clearly identify an appropriate school placement.

The Fourth Circuit Court of Appeals opinion sets forth the relevant portions of the IDEA, the

implementing regulations, and the pertinent case law. The panel meticulously reviewed the law and the facts and properly concluded that ACPS actions did not comply with the IDEA. The Court denied the Petitioner's request for Rehearing or Rehearing En Banc with only one Judge dissenting. Every Judge, including the sole dissenter, agreed that the School Board did not comply with the IDEA.[2]

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT AMONG THE CIRCUITS.

A. The Majority Decision Properly Reviewed and Analyzed Prior Case Law and Applied it to the Facts of this Case.

The Petitioner represents that the Fourth Circuit's decision cannot be reconciled with prior case law. However, the Panel reviewed the precedential cases and properly applied them to the facts of this case. ACPS argues that the panel's decision is inconsistent with prior discussions of educational placements in the Fourth Circuit. (Petition for Certiorari (hereinafter, "Petition"), pg.14). ACPS reaches this conclusion by interchanging

2. Judge Gregory stated in his dissent to the denial of the request for rehearing that "[t]he school district did violate the IDEA — the law requires that an IEP identify the anticipated, frequency, duration, and location for the provision of educational services, and A.K.'s IEP specifies no location." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 497 F.3d. 409, 409, 2007 U.S. App. Lexis 17925, (reh'g denied, (4th Cir. 2007)(Gregory, J., dissenting from rehearing en banc) App. 47(a) - 48(a)).

the terms educational placement and location. Both the majority and the dissent rejected this analysis. The panel majority discusses this issue in great length and reasoned in the A.W. case that:

> We held that the term educational placement as used in the stay-put provision refers to the overall educational environment rather than the precise location in which the disabled student is educated. We nevertheless observed that a change in location at which special education services are provided causes a change in "educational placement" if the location change results in a dilution of the quality of a student's education or a departure from the students [least restrictive environment] compliant setting. (484 F3d. 680, App. 11(a), (*citing, A.W. ex rel Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004) (internal quotes omitted)).

The Court goes on to reason that "in light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an educational plan, it stands to reason that it can be a critical element for the IEP to address." (*A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 680, (4th Cir. 2007) , App. 12(a)). Even the dissent supports the majority opinions analysis that educational placement is not to be used interchangeably with location. Judge Gregory concluded that: "[t]he statue does not define *location* as it is used in 20 U.S.C. § 1414(d)(1)(A)(i)(VII)(Supp. 2004), but the term must refer to something other than an educational placement." (484 F3d. 683, App. 21(a)). The terms educational

placement and location are contained in different provisions of the IDEA. These sections have separate and distinct purposes and therefore the Petitioner's attempt to equate them is improper. The Court properly analyzes and applies the precedent from the prior Fourth Circuit cases to the requirements set forth in the IDEA.

B. The Majority Holding is Consistent with the IDEA and the Case Law.

ACPS argues that the majority holding conflicts with decisions from other courts of appeals. ACPS goes on to argue that the reliance by the Fourth Circuit on two Sixth Circuit opinions was improper. ACPS distinguishes these cases by asserting that the school systems failed to set forth an educational placement as opposed to a location. This distinction is without merit and is not supported by a proper reading of the cases. ACPS bases this argument on the premise that the Fourth Circuit Decision would require every IEP to name a particular school. (See, section III below). This simply is not what the Fourth Circuit required. The cases relied on by the panel majority are in fact directly on point. In *Glendale*, the court examined a case where several school placements were offered. The Court held that:

> A school district cannot abdicate its responsibility to make a specific offer allowing a parent to choose from among several programs presented as formal offers. After discussing the advantages and disadvantages of various programs that might serve the needs of a particular child, the school district must take the final step and clearly identify

> an appropriate placement from a wide range of possibilities. It was the District's responsibility to use its expertise to decide which program was best suited for [the student"s] needs. *Glendale Unified Sch. Dist. v. Talmar Almasi*, 12º F. Supp. 2d 1093, 1107, U.S. Dist. Lexis 17815 (9th Cir. 2000)).

In reaching this conclusion, the *Glendale* Court noted that offering a variety of placements puts an undue burden on a parent to eliminate potentially inappropriate placements, and makes it more difficult for a parent to decide whether to accept or challenge the school district's offer." *Glendale*, 122 F. Supp. 2d 1107. This case is directly on point and consistent with the requirements and the purpose of the IDEA.

Likewise, *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001), relied on by the majority, is on point. In fact, the *Knable* case applies a common legal principle to the IDEA. Specifically, the *Knable* Court noted that "as an initial matter, we note that we must limit our evaluation of [the] proposed IEP to the terms of the document itself, as presented in writing to the [parents]." (*Knable*, at 768). The *Union* case is equally as relevant and ACPS' attempt to distinguish it as transparent. In *Union*, the School District failed to make a formal specific written placement offer. (*Union Sch. Dist. v. Smith*, 15 F. 3d 1519, 1994 US. App. Lexis 1479 (9th Cir. 1994)). The *Union* Court noted that the Supreme Court placed great importance on the procedural requirements of the IDEA and held that:

> We find that this formal [writing] requirement has an important purpose that is not merely

> technical and we therefore believe it should be enforced rigorously. The requirement of a formal written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement if any. Furthermore, a formal specific placement offer from a school district will greatly assist the parents in "complaints with respect to any matter relating to the . . . educational placement of the child." *Union*, 15 F.3d at 1526.

In an attempt to create a split among the circuits, the Petitioner relies on several cases which they argue "have consistently interpreted 'location" to be the location of services within an educational program, rather than location of the educational program itself." (Petition, pg. 19). Each of the cases cited by the Petitioners are distinguishable from the case at bar. Specifically, *Leonard v. McKenzie*, 869 F.2d. 1558, (D.C. Cir. 1989), *Weil v. Board of Elementary and Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991), *Christopher P. v. Marcus*, 915 F.2d. 794 (2nd Cir. 1990), and *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS79) v. New York City Board of Ed.*, 629 F. 2d. 751 (2nd Cir. 1980)(cert. denied), 449 U.S. 1078 (1981) **are all cases decided prior to the 1997 amendments** to the IDEA. This is material because the 1997 amendments added the requirement that the location be identified on an IEP. This is the precise issue which is before the court. Therefore, these cases have no relevance on the question before the court.

The two reported post-1997 IDEA amendment cases that are mentioned by the Petitioners are not on point. In these cases, the courts were looking at different provisions of the IDEA all together.[3] In *John M. v. Board of Educ. Of Evanston Township*, 2007 U.S. App. LEXIS 22146 (7th Cir. 2007), the Court of Appeals examined 20 U.S.C. § 1415(j) in terms of the stay-put provision. In that case, the parents were fully informed of the location and identity of the school being proposed so the issue is distinctly different. Since 20 U.S.C. § 1415(j) and 20 U.S.C. § 1414(d)(1)(A)(i)(VII) have separate purposes and use different language the Petitioner's reliance on the cases interpreting the stay-put provision are inapposite to the question presented here. In fact the Circuits that have examined the terms location and educational placement have in fact determined that they have separate and distinct meanings. The *A.W.* case, which is discussed at length above, and by Fourth Circuit, notes that the terms are not interchangeable. Even Judge Gregory in his dissent agrees that the terms are not to be interpreted the same.

Unlike the cases relied on by the Fourth Circuit Court of Appeals, the cases cited by ACPS are not directly on point to the issue before the Court. There simply is not a split in the circuits regarding the requirement that 20 U.S.C. § 1414(d)(1)(A)(i)(VII) requires that a school district specify a particular school as the location where the IEP is to be implemented. When other circuits have examined the precise issue as raised in the case at bar, they have reached the same conclusions.

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3. The *Jennings v. Fairfax County School Board*, 35 IDELR 158 (E.D. Va. 2001) aff'd, 2002 U.S. App. LEXIS 14372 (4th Cir. 2002) case was an unpublished opinion limited to the facts of that case.

II. THE PETITION FOR WRIT OF CERTIORARI INCORRECTLY STATES THE HOLDING OF THE FOURTH CIRCUIT.

A. The Petitioner Mischaracterizes the Holding in the Case at Bar.

1. All Three Panel Members Held that ACPS' Actions Did Not Comply with the Requirements of the IDEA.

It is critical to note that all three judges, even Judge Gregory who wrote the dissent, acknowledge that ACPS' actions did not comply with the requirements of the IDEA.[4] The Petitioner's request for a rehearing or rehearing en banc failed to produce a single vote from the remaining members of the Fourth Circuit Court of Appeals which felt that ACPS had complied with the IDEA.

2. The Majority's Decision Properly Applied the Law to the Facts of the Case.

The Fourth Circuit held that ACPS failed to offer a free and appropriate education to A.K. because the individual education plan did not identify a particular school where A.K. would be educated. (484 F.3d 672, 681, App. 13(a)). The panel majority began their analysis by reviewing who had the burden of proof and what standard of review

4. See, majority opinion: "ACPS failed to offer FAPE because the IEP did not identify a particular school at which [the IEP] anticipated that A.K. would be educated." 497 F.3d 409, 21(a)). See also, dissent: "[t]he IEP that ACPS prepared for A.K. was flawed — it did not include the location at which A.K. would receive special educational services." 484 F.3d. 683, App. 20(a)).

was to be applied. Acknowledging that the Parents bore the burden of proof, the Court goes on to state that factual findings are to be reviewed under a clear error test unless it is based on an incorrect application of the law, as in the case at bar.

In reviewing the applicable provisions of the IDEA and the subsequent case law, the Court determined that identifying a location **can** be a factor to determine if a free and appropriate public education was offered. In support of this holding, the Court reviewed the wording of 20 U.S.C. § 1414(d)(1)(A)(i)(VII) and the Senate Report concerning the 1997 amendments to the IDEA. (484 F.3d 684, App. 11(a)). Specifically, the Court noted that the requirement that a location be identified was added to the provision because location "influences decisions about the nature and amount of these services and when they should be reported." (484 F.3d 684, App. 11(a), *quoting*, S. Rep. No. 105-17, at 21 (1997)).

The holding was also supported by the prior case law of the Fourth Circuit which the panel analyzed. The Court stated that "in light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an education plan, it stands to reason that it can be a critical element for the IEP to address." (484 F3d. 680, App. 12(a)). The Fourth Circuit reached the only logical conclusion based on the facts of this case: the school system must identify a particular school which can implement the IEP. Otherwise, the school could offer "utopia" to every student without the responsibility of insuring that it exists. Under the IDEA, the school has the responsibility to educate the student based on the individual education plan. Inherent in that responsibility is the obligation to identify the school where that IEP can be implemented.

3. ACPS' Petition Misstates the Majority Holding.

ACPS seeks to have this Court hear this case based on two premises: 1) the decision is in conflict with other case law 2) the precedent which is established could be costly to school systems. Neither of these two premises is consistent with a proper reading of the majority's decision. ACPS argues that:

> The Court of Appeals' decision that an IEP must not only describe the features of the special education program, but include the name of a specific school is not only applicable to a narrow subset of cases under the IDEA . . . On its face, [the Fourth Circuit decision], would invalidate as a matter of law most if not all of the hundreds of thousands of IEPs in the Fourth Circuit alone. (Petition, pg. 12)

This statement upon which the Petition For Certiorari is premised, mischaracterizes the Court's holding. Notwithstanding ACPS' assertions to the contrary, the panel does not create a bright line test that the IDEA requires all individual education plans to identify a specific school in all cases. The Court articulated the narrow application of their decision:

> **Here**, we hold as a matter of law that because it failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefit. *See, Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982). Indeed this case presents an

> excellent example of the circumstances under which inclusion of a particular school in the IEP **can** be determinative of whether a free and appropriate public education has been offered. (484 F.3d 681, App. 13(a))(emphasis added).

The Fourth Circuit made their holding very clear: not every IEP requires the school system to identify a particular location. The court goes on to state:

> We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly. (484 F3d. 682, App. 15(a)).

Even the dissent acknowledges that the holding of the Fourth Circuit does not dictate what the School Board asserts. In his dissent, Judge Gregory notes that "[m]ore than once the majority acknowledges that the failure to identify the location of the provision of special education services on a student's IEP need not always result in the denial of FAPE." (484 F3d. 684, App. 22(a)). ACPS' unfounded assertion that hundreds of thousands of IEP in the Fourth Circuit alone will become invalid as a result of this decision is a material misstatement of the holding.

4. The Rule ACSB Advocates Would Frustrate Congress' Intent to Provide Children with Disabilities a Free Appropriate Public Education.

ACPS argues that their failure to identify a location where the IEP could be implemented was a "technical procedural misstep" and therefore should be subject to a harmless error test. However, after a careful review of the facts the majority opinion rejected this analysis because the result of the process, as advocated by the Petitioner, would be to frustrate the intent of the IDEA. The Court concluded that the error which occurred was not procedural in nature but rather substantive. The Court stated "[b]ecause we view this claim as an alleged deficiency in what ACPS was offering rather than in the procedure by which the offer was developed or conveyed, we consider the alleged violation to be substantive." (484 F3d. 679, FN 7 citing, *Knable ex rel Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 767-70 (6th Cir. 2000)). The Court went on to expressly reject that a harmless error test should be applied in this context and stated:

> The dissent appears to assert that the failure of the IEP to identify a particular school was a procedural violation subject to harmlessness analysis rather than a substantive violation because the parents would have sent A.K. to Riverview no matter what ACPS offered. See post, at 17-20. This argument conflates the question of whether a violation is merely procedural - and thus subject to harmlessness analysis - with the harmlessness analysis itself. Under the dissent's logic, even a complete

> failure by a school district to offer - formally or informally - any alternative to the parents' favored educational plan would amount to only a harmless procedural error if the district could establish that the parents would not have been receptive to the district's offer." (484 F3d. 679, App. 17(a)-18(a)).

The line between the substantive and procedural errors in this case did not turn on a legal question of how to classify the violation, but rather on a fact-bound question of notice. Furthermore, whether the facts of this case were sufficient to put the parents on notice is not fairly encompassed in the question presented in the Petition nor was it raised below which makes it unworthy of this Court's review. The majority properly concluded that the violation of the IDEA that occurred in this case was substantive. Furthermore, the majority carefully examined the argument set forth by ACPS, which were also advanced by the dissent, and determined it to be illogical. The result of ACPS actions was to require the Parents to identify and locate a private day school in the area existed which would be a satisfactory fit. The Court correctly held that this was not the way the IDEA was designed to work. It is incumbent on the School District to utilize its expertise to clearly identify an appropriate placement from the range of possibilities.[5]

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5. This analysis is particularly pertinent in this case. The reason the Parents were unable to determine at the June 9, 2004 meeting if they should sign the IEP, was because not one person at the IEP meeting could determine if any such placement actually existed which could implement the IEP.

ACPS' argument that the failure to identify a particular school was a technical procedural error which did not substantively deprive A.K. of any educational opportunity is without evidentiary support. Furthermore, the Petitioner's reliance on *White ex rel White v. Acension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003) and *C.J.N. v. Minneapolis Public Schools*, 323 F.3d 630 (8th Cir. 2002) is misplaced. (Petition, pg. 29). Pursuant to 20 U.S.C. § 1415(f)(3)(E), a procedural violation which impedes the child's right to a free and appropriate public education, or significantly impedes the parent's opportunity to participate in the decision making process for their child's education or causes a deprivation of educational benefits results in a denial of a free and appropriate education. (*See, Speilberg v. Henrico County Public Sch. et. al.*, 853 F.2d 256, 1988 U.S. App. Lexis 10792 (4th Cir. 1988)(citing, *Hall v. Vance Cty. Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)). The *White* court was examining the parent's complaint that they had not been provided the opportunity to have input into the location determination. The location and identity of the school was known to everyone. The quote relied on by the Petitioners was merely dicta and not dispositive of the case. The *CJN* court was examining the stay put provision of the IDEA and the brief comment quoted by the Petitioner's has no relevance in the case at bar. The determination that the violation was substantive not procedural in the case at bar does not conflict with precedent from the Fourth Circuit nor any other circuit.

ACPS' attempt to bring this court into an entangled factual dispute is unnecessary. Even if the error in this case was procedural in nature, the result was a denial of a free and appropriate public education. In the case-at-

bar, both the student's education and the parents rights were compromised. First, A.K. was scheduled to begin summer school on July 1, 2004 but no schools were even contacted by ACPS until July 9, 2004. Therefore, A.K.'s rights to a free and appropriate public education were impeded. Second, the Parents' rights were also significantly infringed upon. The IEP chairperson, without consultation with the Parents, determined what schools to apply to for A.K. and thus she undermined the Parents' role completely. The Parents were only notified of which schools were being considered when they were carbon copied on correspondence to the specific schools. Finally, the fact that a school was not identified which could implement the IEP for A.K. was by very definition a deprivation of educational benefit. A.K. could not have received an education because no school existed that could implement the IEP. The Fourth Circuit Court of Appeals properly found a substantive error occurred in this case. However, even assuming arguendo that the error was procedural in nature, the result under the IDEA was that A.K. was denied a free and appropriate public education.

5. The Majority's Decision Does Not Expose Local School Systems to Substantial Monetary Claims.

ACPS argues in their Petition that the Court should hear this case because the case could potentially invalidate every IEP in the Circuit. ACPS also asserts that the decision is at odds with consistent regulatory guideline. (Petition, pg. 25). ACPS' argument is based on a misapplication of the majority holding and thus is a thinly veiled attempt to obtain a Writ of Certiorari. The

majority opinion was very clear that its holding is limited to only very narrow factual situations. The issues involved certainly do not apply to every IEP in the Circuit. The Court's analysis is limited to cases where location is a key factor in determining if a school program exists which can implement the IEP.

ACPS asserts that this Court should look to the Department of Education to interpret the IDEA. However, the Court's only defer to the regulatory agency when there is an ambiguity. Location is a clear concise term which is not subject to more than one interpretation. ACPS tries to create an ambiguity by interchanging the terms "location" and "educational placement." However, the terms have separate and distinct meanings. Despite ACPS' assertions to the contrary, the term "location" is discussed in the legislative history. The majority decision specifically reviewed the Senate Report concerning the 1997 amendments to the IDEA which added the requirement that the location be identified. (484 F3d. 680, App. 11(a)). As noted by the majority, location is a key factor because the location influences decisions about the nature and amount of the services and when they should be provided. (484 F3d. 680, App. 11(a)). The Fourth Circuit properly reviewed the intended meaning of the word location and interpreted the meaning based on the intent Congress prescribed for it in amending the IDEA.

The holding of the majority will not expose local school systems to potential monetary claims. In fact the opposite is true. As noted by the *Knable* Court and the *Union* Court in discussing the importance of the formal written placement offers, the requirement is not merely

technical, but rather serves the important purpose of creating a clear record of what was offered to the Parents. The written offer helps to eliminate factual disputes between the School District and the Parents about the proposed placement.

ACPS asserts that the Court of Appeals "demonstrated little understanding of the way the IEP and placement process actually does work." (Petition, pg. 20) They further argue that "the effect of the Court of Appeals's decision here, however, is to encourage parents not to participate fully in IDEA's IEP process in order to identify a less restrictive placement." (Petition, pg. 21). There is simply no factual basis to this argument. First, the IEP and placement process only works when the School identifies an appropriate placement for a student with a disability to be educated. As noted by the majority, in some limited factual situations, this requires the identification of a particular school location. If this step is not completed then the entire IEP process falls short of the goal of the IDEA: to provide a disabled student with a free and appropriate public education. The Fourth Circuit's in depth understanding of the IEP process is woven through out their opinion. The Court noted "we emphasize that the IEP-development process is a co-operative one. Thus, if the School District identifies several schools during the process that it believes would serve the needs of the child, parents will have the opportunity to voice their preferences before the IEP is finalized." (484 F3d. 681, FN 10, App. 19(a)). The process as guaranteed by the IDEA can only be satisfied by the analysis presented by the majority opinion.

Furthermore, when a school location is identified by the School Board, the only litigation that is necessary is to determine if the proposed school meets the requirements of the IDEA. The process as outlined by ACPS would require that the litigation cover whether **any** private day school could meet the needs of the student. The process as outlined by the Fourth Circuit insulates the school from burdensome litigation by creating a clear concise record.

The Court of Appeals decision also promotes the cooperative process of the IDEA resulting in a placement in the least restrictive environment. When the IEP team is required to complete the process, as contemplated in the IDEA, the meeting culminates with a discussion about placement. The IEP team, including the Parents, would have the ability to discuss all of the potential placements available along a continuum of services. Once all of the options were known to the Parents, and all members of the IEP team, the process would allow for a decision of which environment could provide the student with a free and appropriate public education while ensuring that the student was in the least restrictive environment. The Fourth Circuit, relying on the *Glendale* case, concluded that after "discussing the advantages and disadvantages of various programs that might serve the needs of a particular child it is incumbent on the school district to utilize its expertise to clearly identify an appropriate placement from the range of possibilities." (484 F3d. 681, (citing, *Glendale*, 122 F.Supp. 2d at 1107 (internal quotations omitted), App. 14(a)). As noted by the Fourth Circuit, the identity of a school is a key element in determining if a placement is appropriate, if the Parents are not informed of what

potential placements are available this discussion cannot take place.[6] It is the responsibility of the School, not the parents, to utilize their expertise in the area of education to identify potential placements. The result of the Fourth Circuit's decision is to promote the cooperation of the Parents and the School personnel in finalizing a placement for the student.

The Fourth Circuit Court of Appeals decision properly applied the IDEA and the case law to the facts of the case. The decision results in insulating the school system from costly litigation by limiting factual disputes and allowing the Parents to participate in the IEP process in the cooperative manner as outlined in the IDEA.

III. THE QUESTIONS PRESENTED BY THE PETITIONER ARE PREMISED ON AN INCORRECT STATEMENT OF THE RECORD.

A. ACPS Did Not Make an Offer of Placement of Two Schools.

In their petition for writ of certiorari, the Petitioner provides a Statement of Facts. However, the representations of the Petitioner are not consistent with the evidence or the findings of the Fourth Circuit Court of Appeals. A critical element to this case revolves around what, if any, schools were offered by ACPS as

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6. One factor considered in the least restrictive environment is the proximity to the student's home. Since the school system, not the parents, have access to the availability of programs they must disclose this information to ensure that the student can be placed in a program which is closest to their home.

placement options. In their Statement of Facts, ACPS asserts: "During the final IEP meeting, School Board staff suggested to the Parents two specific private day programs that could implement the IEP: Phillips School and Kellar School." (Petition, pg. 4). However, ACPS' witness and IEP chair person, Susie Sullivan, testified that she gave the Phillips School and the Kellar Center as **examples** of private day placements that were **mentioned**. (J.A. at 966 (Dr. Kling), 1134-1135 (E. Sullivan)). ACPS is now trying to re-characterize the evidence to say that a mention or an example constitutes an offer of placement. Furthermore, there is nothing in the record which supports ACPS' proposition that the school asked the Parents at the IEP meeting to consider the schools as placements. The notion that ACPS made an offer of placement to the Phillips School and the Kellar Center was expressly examined and rejected by the Fourth Circuit Court of Appeals. Specifically, the Court of Appeals held "with the IEP not identifying any particular school (because the IEP team had not discussed the issue) the Parents were left to fend for themselves to determine whether any private day school in their area — including the five ACPS applied to would be a satisfactory fit." *A.K.*, 484 F.3d 672, 681, (4th Cir. 2007), App. 14(a).

Further compounding ACPS' misstatement is the assertion that A.K.'s Parents refused to consider any placement recommendations. The Parents did not reject any school at the IEP meeting. A.K.'s mother testified that she had in fact undertaken an extensive review of the local private day schools in the past and felt they could not provide A.K. a free and appropriate public

education. (J.A. 1124, 1135).[7] Her comment regarding the private day schools was made in the context of an IEP meeting which is a cooperative process — it was not an immediate rejection. A.K.'s Parents continued to try to find a private day placement and **A.K.'s mother visited both the Phillips School and the Kellar Center again after the IEP meeting in hopes that they would provide an appropriate placement for her son.** (J.A. 1153). Nothing which the Parents said or did evidences that they rejected either school at the IEP meeting. The majority opinion carefully evaluated the evidence and concluded:

> Although Sullivan mentioned during an IEP meeting that Kellar and Phillips would be possible placements, the IEP team had never considered whether these particular schools would be able to satisfy A.K.'s specialized needs. (484 F.3d 681, App. 13(a)).) ... Especially in this case, in which the parents had tried in vain to find a local private day school that could meet A.K.'s specialized needs, the offer of an unspecified "private day school" was essentially no offer at all. (484 F.3d 682, App. 13(a)).

The actual "offer" of placements relied upon by ACPS occurred for the first time at due process hearing.[8] The

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7. J.A. represents citations to the Joint Appendix filed in the Court of Appeals.

8. A.K.'s father testified that the very first time anyone from ACPS discussed specific private day placements with them was at the due process hearing. (J.A. at 1097).

evidence demonstrates that the Parents and ACPS' witnesses acknowledge that A.K.'s Parents were not offered these two programs at the IEP meeting. (J.A. 1296, 1298 (Hearing Officer's findings)). ACPS' counsel also acknowledged this in his opening statement. (J.A. 480). The "offer" was merely a statement by ACPS' counsel that two schools could implement A.K.'s IEP. (J.A.1097 (Dr. Kling)).

What the record demonstrates is that Susie Sullivan directed the IEP team to make a recommendation for a private day placement as the level of service. This is evidenced by ACPS' own witnesses. Ms. Cohen, an autism resource specialist for ACPS, testified that at the time she made the recommendation of a private day program, she did not have any knowledge about any specific day programs being considered or any teacher to student ratios at these schools; however, she voted that a private day school was the appropriate placement. (484 F.3d 681, 13(a), J.A. 567 C. Cohen)).[9] Ms. Cohen was simply doing what her superior told her to do.

The Parents adamantly disagree with ACPS' statement that all of the "parties agreed that [the IEP] fully and accurately described A.K.'s present level of performance." (Petition, pg. 3). The IEP team ignored a critical element of the placement decision. The Parents sought the advice of an outside educational expert to help them determine the factors that would need to be considered in determining the educational setting where A.K. could make educational progress. The Parents did this in accordance with the mandates of the IEP and

9. All of the experts agreed that the student to teacher ratio was critical for A.K.'s success.

presented a written report and requested that it be made part of the IEP. Not only did the IEP chair person refuse to make it part of the IEP, she acknowledged that she did not read the expert's recommendations prior to determining that a private day placement could meet A.K.'s unique individual needs. (J.A. at 648, 650-651, 1065 (S. Sullivan) 1154, 1157 (E. Sullivan))

The evidence in this case is very clear that no offer of specific schools were made at the IEP meeting. Furthermore, it is undisputed that after the IEP meeting ACPS sent out applications to five different schools seeking a placement for A.K..[10] After a careful review of the record, the panel majority found:

> That ACPS proceeded to submit applications on A.K.'s behalf to five different private day schools, at least two of which indicated, without even meeting A.K., that they could not satisfy his specialized needs, only highlights the need for the IEP team and the IEP to identify a particular school. (484 F.3d 681, App. 14(a)).

If an offer of placement was made to the Keller Center and the Phillips School, there would have been no need

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10. Three of the schools rejected him out right without even meeting with him. (J.A. 436-437, 1151 (E. Sullivan)). Both the Lab School and the Oakmount School wrote to Susie Sullivan and stated that after reviewing the information forwarded by ACPS they could not meet A.K.'s unique needs. (J.A 436, 437). By sending out the applications to schools that were never even discussed with the parents, the critical element of parental input was disregarded.

to apply to other schools. ACPS did not make an offer of placement of two schools. Therefore, ACPS' entire argument is based on a faulty premise.

B. The Parents' Actions in this Case were Exemplary.

ACPS' attempts to try to discredit the Parents' actions in this case in an effort to relieve the school system of the responsibility to identify a placement for a disabled student under the IDEA. Specifically, ACPS tries to blame the Parents for the failed IEP process by stating that "without engaging in the interview process, on July 9, 2005, the Parents filed for an administrative hearing under IDEA, rejecting the School Board's proposal for a private day placement." (Petition, pg. 5). ACPS additionally tries to fault the Parents by continually referencing that A.K. was not brought to the Phillips School or the Kellar Center for an interview. These allegations are material misrepresentations.

The record is clear in this case that A.K.'s Parents went above and beyond what is required of any parent. First, in an effort to try to keep A.K. in the public school setting, A.K.'s Parents paid for staff training, consistently worked with school staff, and sought out school support so A.K. could attend his local public school. (J.A.1118-1121 (E. Sullivan)). In the past when ACPS failed to identify the aide required by A.K.'s IEP in time for the school year to begin, A.K.'s mother located and paid an aide until one could be hired by ACPS. (J.A. 1119 (E. Sullivan)). It was not until A.K. was repeatedly assaulted in the public school that the Parents accepted ACPS' recommendation to remove him from

that setting. It was at this point that A.K.'s Parents undertook an extensive review of local private day placements. (J.A. 957-959 (Dr. Kling) 1124-1127 (E. Sullivan)). The IEP process was long and arduous and lacked good faith participation from the school system. Rather than applaud the tremendous effort of the Parents of a disabled child, ACPS turns around and states that the parents have refused to cooperate. This is not only misleading, it is disingenuous.

ACPS also alleges that A.K.'s Parents were at fault because they did not bring A.K. on numerous school visits.[11] (Petition, pg. 5). They fail to acknowledge that A.K.'s mother promptly visited, and in the case of the Phillips School, revisited the schools. ACPS portrays these school visits as necessary visits which A.K. failed to attend. However, no where in the record is there any evidence that A.K.'s mother was ever advised that A.K. could attend the visits. The **un-rebutted** evidence was that she was never asked to bring A.K. to the schools at the time of her visits. (J.A. 1151 (E. Sullivan)). Furthermore, A.K. was in school in Massachutes. The IDEA process was not envisioned to have Parents of a

11. ACPS takes the position that A.K. should have visited multiple schools before it was even determined if a placement was available for him. This shows a fundamental misunderstanding of this student and his disability. A.K.'s mother looked at the potential schools and in consultation with multiple experts determined that the placements would not be able to provide A.K. with a free and appropriate public education. In fact, the professional opinions of individuals whom knew A.K., was that the placement at either the Phillips Center or the Kellar Center would cause actual harm to A.K. with potential long term negative consequences. (484 F.3d 678-679, App. 8a, (see also, J.A. 921(Cheryl Wietz) 1008, 1020 (Dr. Stixrud)).

disabled child go from school to school in hopes that a particular placement could educate their son only later to be told their visits did not measure up to the expectations of the school system. As noted by the majority: "[t]his is not how the IDEA was designed to work." (484 F.3d 681, App. 14(a)).

ACPS also faults A.K.'s Parents because they made a down payment for Riverview, in April.[12] A.K.'s Parents were placed in a no win situation due to ACPS' inaction. The Parents sought information from ACPS as early as January 2004, regarding where A.K. would attend school the following year. After repeated requests from the Parents to ACPS to determine and discuss potential placements, there was no indication that A.K. would not continue at Riverview.[13] (J.A.1219-1220 (S. Sullivan)). Therefore, when A.K.'s Parents were notified by the Riverview School that if they did not make a down payment A.K. would not be able to attend Riverview the next year, they made the down payment. The evidence,

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12. The Parents paid for the participation of the Riverview Staff and an attorney for over nine hours of IEP meetings. (J.A. 961 (Dr. Kling)). They continued to investigate placements in hopes of identifying a private day school locally. (J.A.1149-1153 (E. Sullivan)). If it was their intent for A.K. to attend the Riverview School all along, they would not have spent their time, money, and energy to participate in this long and difficult process. It is disingenuous for ACPS to now characterize the efforts of A.K.'s Parents as anything other than exemplary.

13. For the 2003-2004 school year the Parents were forced to file for due process because ACPS failed to identify an appropriate placement. Prior to the due process hearing, the parties settled the case and A.K. attended the Riverview School with partial funding from the School Board. (J.A. 466).

as determined by the Hearing Officer was that if A.K.'s Parents had not made the deposit, a spot would not have been reserved for him.

A.K.'s Parents were forced to file for due process because the services were scheduled to begin on July 1, 2004, and as of July 9, 2004, when the parent's filed for due process, no school placement had even been identified for A.K.. The IEP that was controlling A.K.'s education was meaningless because by the School Board's own admission they had no where to implement the IEP when it was due to start. It was not until after the IEP was scheduled to begin, that ACPS even sent applications out to five schools. This was egregious given the fact that the Parents sought to have other placements identified six months earlier. Throughout A.K.'s enrollment at Alexandria City Public Schools, A.K.'s Parents have acted in good faith and gone well above the requirements of the IDEA.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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